FILED: May 21, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARLES E. MINES, JR	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-00-CV-2044-H
	§	
JANIE COCKRELL,	§	
DIRECTOR, TEXAS	§	
DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
INSTITUTIONS DIVISION,	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636(b), implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge follow:

FINDINGS AND CONCLUSIONS

I. NATURE OF THE CASE

A state prison inmate has filed a petition for writ of habeas corpus pursuant to Title 28, United States Code, Section 2254.

II. PARTIES

Petitioner, Charles Mines, Jr., is an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). Respondent is the Director of TDCJ-ID.

III. PROCEDURAL HISTORY

A jury convicted Petitioner of capital murder, and his punishment was assessed at death by lethal injection. *State v. Mines*, Cause No. 16,691 (40th Judicial District Court of Ellis County, Tex. June 2, 1989). The case was appealed to the Texas Court of Criminal Appeals, and the Court of Criminal Appeals affirmed the conviction and death sentence in a published opinion. *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1993). The Supreme Court then granted Petitioner's petition for certiorari and remanded the case back to the Court of Criminal Appeals for reconsideration in light of its opinion in *Johnson v. Texas*, 509 U.S. 350 (1993). *See Mines v. Texas*, 570 U.S. 802 (1993). On remand, the Court of Criminal Appeals once again affirmed Petitioner's conviction and death sentence. *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1117 (1995). Petitioner subsequently filed a state application for writ

of habeas corpus on April 7, 1997. The Court of Criminal Appeals denied relief in a published opinion. *Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 908 (2001).

Petitioner filed his initial federal petition for writ of habeas corpus on December 21, 2000, and an amended petition on April 20, 2001. Respondent filed an answer on June 18, 2001, and furnished the state court records.

IV. RULE 5 STATEMENT

Respondent states that Petitioner has exhausted all of his state court remedies, except for his fourth ground for relief and portions of his fifth and sixth grounds for relief. Respondent asserts that Petitioner did not address these claims either on direct appeal or in his state writ of habeas corpus. Nonetheless, Respondent asserts that these claims should be denied on their merits pursuant to 28 U.S.C. § 2254(b)(2).[1]

V. ISSUES

Petitioner raises the following eleven claims for relief:

---

[1] An application for a writ of habeas corpus may be denied on its merits, notwithstanding the failure of the application to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b)(2) (West 2001).

A. Petitioner is presently incompetent to be executed under the standard set forth in the Supreme Court case *Ford v. Wainwright* and subsequent Fifth Circuit case law;

B. Petitioner was convicted and sentenced to death in violation of the Fourteenth Amendment because he was incompetent to stand trial;

C. The trial court violated Petitioner's due process rights by failing to halt the trial and conduct a second competency hearing;

D. Petitioner's confession was obtained in violation of the Fifth and Fourteenth Amendments because Petitioner's assertion that he did not wish to answer any questions was not scrupulously honored by the police;

E. Petitioner was denied effective assistance of counsel at trial in violation of the Sixth Amendment;

F. Petitioner was denied effective assistance of counsel on appeal in violation of the Sixth Amendment;

G. The testimony of Dr. James Grigson at both the guilt and punishment phase of Petitioner's trial violated Petitioner's rights under the Fifth and Fourteenth Amendments.

H. Petitioner's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments

were violated because the jury was unable to give effect to Petitioner's mitigating evidence of mental illness at the sentencing phase of the trial;

I. Petitioner's constitutional right under the Sixth and Fourteenth Amendments were violated because African-Americans were underrepresented in the venire from which Petitioner's jury was selected;

J. Texas' capital sentencing scheme violates the Fifth, Eighth, and Fourteenth Amendments; and

K. The cumulative effect of the above constitutional violations has denied Petitioner his due process rights under the Fifth and Fourteenth Amendments.

Moreover, Petitioner argues that the state habeas court did not adjudicate the majority of the claims raised in the state habeas proceeding on their merits and therefore the court's findings are not entitled to deference. And, Petitioner argues that this proceeding should be stayed because he is currently incompetent to assist in his own defense.

VI. STANDARD OF REVIEW

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. § 2254, provide:

> (d) An application for a writ of habeas corpus on behalf on a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d) (2000).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 ;(5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decided a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-3 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies

that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. Under *Williams*, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Section 2254(d)(2) concerns questions of fact. *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). Under § 2254(d)(2), federal courts "give deference to the state court's findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.) (as modified on denial of rehearing), *cert. denied*, 531 U.S. 1002 (2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

This statute applies to all federal habeas corpus petitions which, as with the instant case, were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Resolution on the merits in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

VII. FACTUAL BACKGROUND

The evidence presented at trial established that during the middle of the day on May 27, 1988, Petitioner entered the home of the eighty-year-old victim, Vivian Moreno, her son Joe, and her physically disabled daughter Frances, by way of a window leading into a closet. After being confronted by Vivian and Frances upon exiting the closet into a bedroom, Petitioner attacked the women, hitting them both numerous times with a hammer that was later found in the bedroom. R. IX:58, 127). Vivian Moreno died as a result of this attack, and Frances Moreno was severely injured, remained in a coma for several weeks after the attack, and at the time of trial remained physically injured because of the attack, was unable to remember any of the events surrounding the attack, and therefore was unable to testify. R. IX:35-36, 143-45).

Petitioner was arrested three days later after being found camped out in a wooded area about seventy-five yards from the house. R. IX:46-47). At the time of his arrest, Petitioner was wearing a shirt and shoes that belonged to Joe Moreno and had Vivian Moreno's crucifix and several items of food from the house in the possession. R.IX: 46-49). Petitioner's fingerprint was found on the windowsill inside of the closet and the board that had covered the window. (R.IX:72, 75, 133-34). Petitioner gave a statement to the police in which he confessed to the crime, stating that he had initially entered the house in order to search for food, and he attacked the two women because he was confronted by them upon entering a bedroom from the closet. (R.IX:80-83).

VIII. REQUEST FOR STAY

Petitioner initially requests that this Court stay these federal habeas proceedings indefinitely. Petitioner asserts that he has been and is currently incompetent to assist his habeas counsel in the preparation of his federal habeas petition. Accordingly, Petitioner asserts that the federal habeas process should be stayed until such time that he is competent to assist counsel.

The only case law Petitioner has cited as support for his contention that this proceeding be stayed is *Calderon v. United States District Court for the Central District of California (Kelly)*, 165 F.3d 530, 541 (9th Cir. 1998). In *Kelly*, however, the Ninth Circuit ruled that the possible incompetency of a federal petitioner was a basis to equitably toll the AEDPA's one year filing deadline. That case did not hold that possible incompetency on the part of a petitioner required that the consideration of a federal petition be stayed. And, more importantly, neither the Supreme Court not the Fifth Circuit has held that a federal petitioner must be judged competent to assist in his defense before a court may consider his petition for writ of habeas corpus. While these courts have recognized that the federal constitution requires that a criminal defendant be competent to stand trial, competent to plead guilty, and competent to waive both direct and collateral appeals, neither court has recognized that the constitution requires that a federal habeas petitioner be competent during the federal habeas process. *See Drope v. Missouri*, 420 U.S. 162 (1975); *Rees v. Peyton*, 384 ;U.S. 312 (1966); *Pate v. Robinson*, 383 U.S. 375 (1966); *Mata v. Johnson*, 210 F.3d 324, 332 (5th Cir. 2000).

To the contrary, in *Mata* the Fifth Circuit, in ruling that a hearing was required to determine whether Mata was competent to waive his right to a federal petition, referred to evidence that Mata had suffered from mental health problems throughout the time that his habeas petition was adjudicated in federal court. Thus, while the Fifth Circuit has not specifically ruled on the particular issue raised by Petitioner, the Court in Mata, by referring to evidence of Mata's ongoing mental problems as possible evidence of his incompetency to waive his collateral attacks, suggested that while Mata was required to be competent to *waive* his federal collateral attack on his conviction and death sentence, he did not have to be similarly competent in order for his federal habeas petition to be considered on its merits by both the district court and the Fifth Circuit. Therefore, without any case law as support for Petitioner's request that his federal habeas proceedings be stayed due to his alleged incompetence to assist in his own defense, this request must be denied.

IX. STATE COURT'S ADJUDICATION

Petitioner further asserts that the state habeas courts recommendation that relief be denied, and the Court of Criminal Appeals' subsequent denial of relief, should not be given deference because, except for one ground, none of the remaining grounds raised by Petitioner during the state habeas process were decided on their merits. As support for this contention, Petitioner points to the Court of Criminal Appeals' published opinion *Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000). In that opinion, the Court of Criminal Appeals only addressed the merits of one of Petitioner's claims and did not mention the substance of the other

claims. Thus, Petitioner argues, none of the remaining claims were addressed on their merits.

Contrary to this argument, however, at the beginning of the opinion, the court noted that Petitioner had filed a state application for writ of habeas corpus containing sixty-eight allegations, that the trial court recommended that relief be denied, and that the Court of Criminal Appeals ordered the case filed and set for consideration on Petitioner's allegation that he was incompetent to assist on his state writ of habeas corpus. *Mines,* 26 S.W.3d at 911. Then, at the end of the opinion the court, after deciding against Petitioner with regards to the submitted issue, specifically stated that: "[t]he relief requested is denied." *Id.* at 916. A subsequent mandate issued by the Court of Criminal Appeals on October 9, 2000, stated that "habeas corpus relief is denied." The Fifth Circuit has stated that a denial of relief by the Court of Criminal Appeals is a denial on the merits. *Dowhitt v. Johnson*, 230 F.3d 733, 755 (5th Cir. 2000). Accordingly, Petitioner's argument is without merit, and it is appropriate that all of Petitioner's claims that were also raised by Petitioner in his state writ should be addressed through the deferential framework of § 2254(d).

But, although Petitioner's state habeas court claims were adjudicated on the merits and subsequently denied, the state habeas court did not issue any findings of fact or mixed findings of fact and conclusions of law. Instead, that court issued an order on June 12, 1997, denying an evidentiary hearing and stating that all relief was denied. (State Habeas Transcript at 118). Neither party had submitted proposed findings, and the state habeas court did not issue any. In its order, the trial court

states that the State's recitation of the facts is supported by the record. However, during the state habeas process, the State submitted a response that only generally denied each ground for relief. No facts were recounted in this response. (SHTr.:110-17). Accordingly, no findings of fact were either made or adopted by the state habeas court at the state habeas level. Without any findings of fact, there can be no presumption of correctness afforded to findings of fact under 28 U.S.C. § 2254(e)(1). *See Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994). This court will not, therefore, accorded any presumption of correctness to any facts developed at the state habeas level.

The absence of findings of fact at the state habeas level, however, does not necessarily necessitate a hearing at this level. *See Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) (noting that a district court does not abuse its discretion in refusing to grant an evidentiary hearing, even where there are no factual findings made by a state court). In the case at hand, this Court has determined that there was adequate factual development of the claims raised either at the state trial level or during the state habeas process. Moreover, there are factual findings that were made at the trial level that must be afforded deference. Accordingly, because no further factual development is necessary at this level, an evidentiary hearing is unnecessary. *See Murphy v. Johnson*, 205 F.3d at 815; *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998) (noting that a habeas petitioner must show either a factual dispute which, if resolved in his favor, would entitle him to relief *or* a factual dispute that would require development in order to assess the claim in order to be entitled to an evidentiary hearing in federal court).

X. EXAMINATION OF THE GROUNDS FOR RELIEF

A. Competency to be Executed

In his first ground for relief, Petitioner asserts that he is currently incompetent to be executed under the standard set forth in *Ford v. Wainwright*, 477 U.S. 399 (1986), and he is therefore entitled to habeas relief. Petitioner states further that he believes that this claim is not yet ripe for review as he does not have a pending execution date, but that he raises this claim now pursuant to *Stewart v. Martinez-Villareal*, 523 U.S. 537 (1998). Respondent in turn agrees that this claim is not ripe for review and further asserts that Petitioner should first exhaust his state court remedies with respect to this issue before seeking federal habeas relief.

In *Ford v. Wainwright*, a plurality of the Supreme Court held both that the Eighth Amendment prohibits the execution of the insane that the procedure used by the state of Florida to determine Ford's competence to be executed was constitutionally inadequate. *Id.* at 409-10, 416. But, Justice Marshall, who wrote the plurality opinior, did not dictate a particular standard for determining whether a person is competent to be executed. In a concurring opinion joined by Justice White, however, Justice Powell stated that the standard he would adopt is one which would require that a criminal defendant who is executed know the fact of his impending execution and the reason for it. *Id.* at 422. Since *Ford* was handed down by the Supreme Court, the Fifth Circuit has stated that the plurality opinion in *Ford* was made a majority by Justice Powell's concurring opinion and has therefore specifically adopted Powell's

standard for determining competency to be executed. *Barnard v. Collins*, 13 F.3d 871, 876 n.2 (5th Cir. 1994), *citing Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988).

In his plurality opinion in *Ford*, Justice Marshall found that Florida's procedure for determining competency to be executed was constitutionally inadequate for several reasons. These reasons were: 1) the procedure did not allow material to be submitted on the prisoner's behalf; 2) there was no opportunity for counsel for the condemned to challenge or impeach the state-appointed psychiatrists' opinions; 3) the psychiatric examinations lasted no more than thirty minutes; and 4) most importantly, the final decision regarding competency to be executed was placed wholly within the executive branch because the decision was made by the governor of Florida. 477 U.S. at 413-6. In the concurring opinion, Justice Powell, joined by Justice White, also suggested that constitutionally acceptable procedure would be one where an impartial officer or board can receive argument and materials from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. *Id.* at 427.

The Texas Legislature has enacted Article 46.05 of the Texas Code of Criminal Procedure, which is a statute outlining a specific procedure to be followed when a prisoner makes a claim that he is incompetent to be executed. *See* TEX. CODE CRIM. PROC. ANN. art. 46.05 (Vernon 2001) (formerly art. 46.04). This statute was enacted in 1999, and Petitioner has not as of yet availed himself of this procedure. Under this state statute, upon a motion filed with supporting documentation, if a

substantial doubt is raised as to a defendant's competency to be executed, the trial court is required to order at least two mental health experts to examine the defendant to determine his competency to be executed. Incompetency to be executed must be shown by a preponderance of the evidence, and after a finding of incompetency is made by the trial court, the Court of Criminal Appeals makes the final determination regarding whether a stay of execution should be issued. This procedure has recently been held to be constitutionally valid by the Fifth Circuit. *Caldwell v. Johnson*, 226 F.3d 367, 373 (5th Cir.), *cert. denied*, 530 U.S. 1298 (2000).

The Fifth Circuit has previously held that the AEDPA bars an inmate from raising a claim that he is incompetent to be executed for the first time in a successive habeas petition where the factual basis for this claim was available when the first federal petition was filed. *Richardson v. Johnson*, 256 F.3d 257, 258-59 (5th Cir. 2001), *cert. denied*, 533 U.S. 942 (2001); *In re Davis*, 121 F.3d 952 (5th Cir. 1997). In the case at hand, the factual basis for this claim is available at this time. Thus, it was necessary for Petitioner to raise this claim in this petition as it would have been barred if raised for the first time after he had exhausted his state court remedies under Article 46.05. However, the state of Texas has not yet had the opportunity to rule on this issue, and there is now a specific procedure to do so. In *Caldwell v. Johnson*, a case in which a federal habeas petition filed a second federal habeas petition raising a *Ford* claim, a Fifth Circuit panel referenced the fact that, when it had previously ruled on Caldwell's first federal petition, the Court had determined that Caldwell's *Ford* claim was premature because he had not yet availed

himself of the procedure outlined in Article 46.05.226 F.3d at 369-70. Moreover, in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998), the Supreme Court held that a federal petitioner's *Ford* claim, raised for the second time after his first claim was dismissed by the district court, was not a successive application under the AEDPA and therefore could be considered on its merits by the district court without receiving prior permission from the circuit court. Therefore, looking at these two cases, it appears that the appropriate action to be taken is that this claim be dismissed in order for Petitioner to exhaust his state court remedies under Article 46.05. It is therefore recommended that this claim be dismissed without prejudice.

B. Competency to Stand Trial

In his second ground for relief, Petitioner asserts that he was convicted and sentenced to death in violation of the Fourteenth Amendment because he was incompetent to stand trial at the time that he was tried for capital murder. Specifically, Petitioner argues that, even though the trial court held a hearing regarding Petitioner's competency prior to his trial and a jury determined that he was competent to be tried for capital murder, the evidence presented at the time of trial, we well as evidence presented during the state habeas process, establishes that he did not have the ability to consult with his attorney or assist his attorney in preparing and presenting a defense at trial.

Applicable Law

The Supreme Court has held that due process requires that a criminal defendant be competent to stand

trial before he is prosecuted. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Specifically, the Supreme Court has stated that the appropriate test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). The Fifth Circuit has stated that a state court's determination of competency is a finding of fact entitled to a presumption of correctness. *Miller-El v. Johnson*, 261 F.3d 445, 454 (5th Cir. 2001), *reversed on other grounds*, ___U.S.___, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, before a federal habeas court has any duty to investigate a claim of incompetency, a petitioner must present sufficient facts that positively establish a legitimate doubt regarding the petitioner's ability to meaningfully participate and cooperate with counsel during trial. *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996). And, under § 2254(e)(1), a habeas petitioner is entitled to a *nunc pro tunc* hearing regarding his competence to stand trial only when he has made a showing by clear and convincing evidence that raises a threshold doubt about his competency. *Miller-El*, 261 F.3d at 454, *citing Lokosv. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980).

Applicable Facts

On March 13, 1989, prior to Petitioner's capital murder trial, the trial court held a competency hearing pursuant to a motion filed by defense counsel. In this motion, defense counsel stated that he believed that competency was an issue at trial because Petitioner had previously been examined by a psychiatrist who judged him to be incompetent to stand trial in a previous case.

(Transcript at 7-8). At this hearing, the defense presented testimony from psychiatrist Dr. Ricardo Schack, and the State presented testimony from the Ellis County jail administrator, a jailer, psychiatrist Dr. James Grigson, and psychiatrist Dr. Quynn Nguyen.

Dr. Schack testified that he had seen Petitioner three time in November of 1988, after he was incarcerated on capital murder charges, and had also examined Petitioner in April of 1988. ®. II:12). Schack testified that in his opinion Petitioner suffers from bipolar disorder. Because he has this disorder, Petitioner has an inflated sense of self-worth and exercises poor judgment, such as declining the services of his attorney, declining to cooperate with the psychiatric examinations, and stating that he did not need to have anything to do with the courts and judges. ®. II:26-27, 31-32, 37-8). Schack further testified that Petitioner was "hyperalert" whenever he saw him and that speaking to him was like being a constant argument, with Petitioner constantly suspicious. ®. II:18-19). Schack also testified that Petitioner was delusional, telling him that he was a gambler with lots of money. (R.II:34). Because of the bipolar diagnosis, Schack testified that Petitioner was unable to make rational and informed decisions regarding his situation and did not have a rational as well as factual understanding of the proceedings against him. (R.II:21). Schack acknowledged that Petitioner knew he had a lawyer who represented him, would communicate to Schack to a limited degree, and was oriented to the date and to the fact that he was in jail. (R.II:24-26). Schack also acknowledged that Petitioner's behavior during the competency hearing was more muted than it had been during the examinations, indicating that he is

capable of controlling his behavior to a certain degree. (R.II:36-37, 40).

Dr. Grigson testified that he attempted to examine Petitioner after being appointed by the trial court, but Petitioner declined to speak to him. Nevertheless, Grigson opined that, based on Petitioner's behavior at their initial meeting and during the competency hearing, as well as Petitioner's records from Terrell State Hospital, Petitioner was competent to stand trial. Specifically, Grigson noted that, while Petitioner had made verbal outbursts throughout the competency hearing, these outbursts were deliberate and intentional and were appropriate responses to questions asked. (R.II:68).

Dr. Nguyen testified that he works at Terrell State Hospital as a psychiatrist. He further testified that Petitioner was sent to the hospital on May 19, 1988, under protective custody in order to be observed and was at the hospital for five days. ®. II:78-81).[2] Nguyen further testified that he conducted a full mental status examination and a physical examination on Petitioner and determined that he was neither physically nor mentally ill. (R.II:81-84). Nguyen also testified that

---

[2] Petitioner had previously been arrested for robbery in Ellis County and spent several months in the county jail. In April of 1988, Dr. Schack examined him and decided that he was not competent to stand trial on the robbery charge. Subsequent to this determination, the prosecutor dismissed the robbery charge and Petitioner was civilly committed at Terrell. After five days of observation there, Dr. Nguyen determined that Petitioner was not suffering from any mental disease or defect and released him. Petitioner then made his wayback to Waxahachie, where the murder was committed. (R.II:94-96; IX:80-83).

Petitioner was unwilling to provide any personal information and would not cooperate with any psychological exam. (R.II:82, 88-89). Nevertheless, Nguyen testified that Petitioner was willing to cooperate with him personally and did not exhibit any aggressive behavior, delusions, or hallucinations while at the hospital. He determined that Petitioner was oriented to time and place, recognized that there was a legal process, and understood why he had been in jail and why he was at the hospital. (R.II:82-83, 96). Finally, Nguyen diagnosed Petitioner as having a mixed personality disorder, with anti-social, paranoia, and passive aggressive features, but testified that as of May 24, 1988, Petitioner was competent to stand trial. (R.II:91-93).

The jail administrator, Jim Underwood, testified that Petitioner was placed in a single cell after a fight with another inmate. He further testified that Petitioner knew he was in jail, recognized that Underwood was a jailer, and told Underwood that he did not want to speak to him unless it was regarding a legal matter. Underwood was not aware of any problems Petitioner caused in jail. ®. II:41-45). Jailer Kelvin Branch testified that he had spoken to Petitioner several times on subjects such as jail administration, sports, and revolutionary China. He further testified that Petitioner knew what materials he was entitled to while in the jail, requested materials such as reading and writing materials, spoke to his attorney when he was there, and dressed, ate, and acted appropriately. Branch did acknowledge that other inmates referred to Petitioner as "crazy man" and that Petitioner had had problems with other inmates before he was placed in a single cell. ®. II:47-61).

During the competency hearing itself, the record reflects that Petitioner made several comments. These comments were made in response to testimony given by various witnesses. The majority of his comments were made when Dr. Schack was testifying and were comments made in answer to questions posed by the attorneys or in order to "correct" the testimony given. For instance, when defense counsel asked Dr. Schack what dates he had met with Petitioner since May of 1988, Petitioner answered with the three dates he saw Dr. Schack in November of 1988. (R.II:12). Later, when Dr. Schack testified that Petitioner was lying down in his cell on the first day, Petitioner corrected him by stating "I never did lay down." (R.II:16). Later, Petitioner corrected the jailer, who referred to him as a black man, by stating that he was "colored," the term he evidently preferred. (R.II:58-59).

During the state habeas process, as well as at this level, Petitioner has submitted further evidence to support his claim that he was incompetent to stand trial. Specifically, two psychiatrists, Dr. J. Douglas Crowder and Dr. Dr. Dhiren Patel, submitted letters to Petitioner's state habeas counsel after examining Petitioner on death row on March 13, 1997. Both diagnosed Petitioner as having bipolar disorder with psychotic features. In his letter, Dr. Crowder went on to discuss the mitigating factors of this diagnosis, but did not give an opinion regarding Petitioner' s competence to stand trial. In his letter, Dr. Patel outlined the various symptoms of bipolar disorder and stated his belief that both Dr. Grigson and Dr. Nguyen missed this diagnosis. Dr. Patel also gave no opinion about Petitioner's competency to stand trial. (Petition, exhibits S & T).

Petitioner has also submitted numerous documents from TDCJ documenting his mental health while on death row. Documents reflect that in March of 2001, he was sent to the crisis management unit for being delusional, particularly regarding his beliefs that other inmates were conspiring against him. There he was documented as having grandiose thoughts, but also as being coherent and well-oriented. He was diagnosed by the psychiatrist at that time as having a severe personality disorder, rather than bipolar disorder, and was discharged back to his unit. (Petition, ex. #2). The documents also reflect a long history of refusing any medical treatment, including any medication for mental disorders. (Petition, ex. #3). Furthermore, the documents reflect that Petitioner had previously been diagnosed as having bipolar disorder, with a sub-diagnosis of anti-personality disorder, in the late 1980's and early 1990's, and that, similar to Dr. Schack's testimony at his competency hearing, Petitioner had exhibited poor judgment and hostile speech throughout his tie on death row. (Petition, ex. #3).

Analysis

The state habeas court denied this claim. This decision is not contrary to federal law. With regard to the evidence presented at the competency hearing, Petitioner in essence reiterates his position that Dr. Schack was correct in his diagnosis and that Drs. Grigson and Nguyen were not. Petitioner also calls into question their diagnoses by pointing to Grigson's history of testifying for the State in capital murder trials and the case load that Nguyen had when he examined Petitioner. All of these points, however, were made at the competency hearing by defense counsel, both during

cross-examination and closing argument. Thus, Petitioner in essence disagrees with the jury's decision. There was evidence presented, however, that supported this decision, including testimony from Dr. Grigson and Dr. Nguyen, as well as from the jailers.

With regard to the additional evidence presented by Petitioner, while this evidence further supports a diagnosis of bipolar disorder, none of this evidence addresses the issue of Petitioner's competency to stand trial and all of it is concerned with Petitioner's condition subsequent to his trial. In the instant case, Petitioner asserts that he was incompetent to stand trial, notwithstanding that the evidence he cites to support his claim was presented to a jury and was unanimously rejected. Moreover, as noted by Respondent, the cases Petitioner cites as support for this claim are cases in which no competency hearing was held at the trial level and a federal habeas petitioner contends that one should have been held. Had Petitioner never been granted a competency hearing, his claim might every well have merit, as the record does contain evidence that calls into question Petitioner's ability to consult with his attorney, as well as his rational understanding of the proceedings against him. But, in the case at hand a full evidentiary hearing has been conducted on this issue, where this evidence was presented to a jury. At this hearing, the jury was instructed that, in order to be considered competent, a defendant must have "sufficient present ability to consult with his attorney with his attorney with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceeding against him." (TR.:58). This was the correct legal test. And, the jury unanimously ruled that Petitioner was competent to stand trial, a factual finding

which is entitled to a presumption of correctness in this Court. (Tr.:60). Given this factual finding, along with the fact that Petitioner has pointed to no new evidence, as opposed to cumulative evidence, to contradict the verdict from that hearing, it cannot be said that Petitioner has raised a legitimate doubt regarding his ability to meaningfully participate and cooperate with counsel during trial. It is therefore recommended that Petitioner's second ground for relief be denied.

C. Failure to hold Competency Hearing

In his third ground for relief, Petitioner contends that the trial court violated his constitutional rights by failing to halt his capital murder trial and hold a second competency hearing. Specifically, Petitioner contends that, although he had previously been found to be competent in a competency hearing conducted on March 13, 1989, his behavior during the subsequent voir dire process and trial was sufficient evidence that required the trial court to halt the trial and conduct a second competency hearing. Accordingly, Petitioner asserts that he is entitled to retrospective competency exam.

In order to protect a criminal defendant's right to a fair trial a trial judge is required to conduct further inquiry into the defendant's mental capacity if he receives information that creates a "bona fide" doubt as to the defendant's competency. *Drope v. Missouri,* 420 U.S. 162, 180-82 (1975); *Pate v. Robinson,* 383 U.S. 375, 385 (1966); *Johnson v. Estelle,* 704 F.2d 232, 238 (5th Cir. 1983). The Fifth Circuit has further explained that a trial court must conduct further inquiry into a defendant's mental competency if he received information which, "objectively considered, should reasonably have raised a doubt about the defendant's

competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence is relevant in order to determine whether further inquiry is required, but the presence of only one of these factors may, in some circumstances, be sufficient to require further inquiry. *Drope*, 420 U.S. at 180. Moreover, even when a defendant is competent at the beginning of his trial, the trial court must be alert to circumstances suggesting a change in his mental capacity. *Id.* At 181.

Petitioner contends that the following was evidence known to the trial judge that should have created a doubt as to his competency to stand trial and thus a second competency hearing was constitutionally required:

1) Petitioner insisted on being tried in jail clothing over his counsel's advice, stating that this was "due to the malfunction of the Ellis County Jail," even thought the trial judge was willing to make civilian clothes available to Petitioner. (R. IV:2).

2) Petitioner, similar to his conduct during the competency hearing, made various statements during the voir dire process, including informing a panel member that he was "colored," not black; telling this same veniremember that she should read the book of Leviticus and its statements regarding homosexuality after she mentioned the Old Testament in response to a question; telling his attorney that "[y]ou don't need to

interrupt" after his attorney stated that he needed to interrupt in order to make a challenge for cause; and informing a potential juror that he did not know what Petitioner did. (R. V:13, 36, 42-43, 52; R. VI:3).

3) At a hearing held during the state habeas process, in responding to a request from Petitioner's attorney that Petitioner be bench warranted back to Ellis County, the trial judge commented that he remembered that he previously had to instruct Petition to bathe himself because he would not do so at the request of jail personnel, that Petitioner could be rambunctious and cantankerous, and that Petitioner would exhibit erratic behavior to his trial defense counsel by sometimes cooperating with him and sometimes not cooperating. (Petition, Exhibit M).

Prior to the imposition of sentence in the instant case, trial counsel filed a motion with the court in which he asserted that the evidence established that Petitioner was incompetent to stand trial and that therefore a competency hearing should be held in lieu of the imposition of sentence. This motion was denied by the trial court. (Tr.:120-121). On direct appeal, the Court of Criminal Appeals ruled that the trial court did not err in denying this motion in light of the recent adjudication of Petitioner's competency at the pre-trial competency hearing. *Mines*, 852 S.W.2d at 948). This same ground was denied on constitutional grounds at the state habeas level.

These decisions are not contrary to federal law. While the evidence that Petitioner points to may have been sufficient to require further inquiry by the trial court had further inquiry not already been conducted, in

the instant case the trial court had held a full competency hearing in which both parties called witnesses and argued their positions to a jury that then unanimously found Petitioner competent to stand trial. Thus, the trial court had already acted to protect Petitioner's due process rights. And, although the Supreme Court has noted that changes in a defendant's circumstances may be sufficient cause for further inquiry into his competence, Petitioner has not shown any change in his behavior or circumstances. While Petitioner was prone to verbal outbursts during voir dire, he made similar verbal outbursts during the competency hearing within the hearing of the jury. (R. II:16), 25, 27, 29, 31, 32, 34, 58). Indeed, two of the three psychiatrists who testified at the hearing commented on these outbursts. (R. II:35, 68-69). Furthermore, Dr. Ricardo Schack also testified at the competency hearing about Petitioner's cantankerous and argumentative personality and his tendency to refuse to cooperate with people, using these observations as further support for his diagnosis of bipolar disorder. (R. II: 18-20, 37). Therefore, Petitioner's tendency towards outbursts and his unwillingness to cooperate with others was not only known by the trial judge prior to Petitioner's trial, but evidence of this behavior was before the jury at the pre-trial competency hearing. Because this competency hearing had been held in close proximity to the trial and because Petitioner has pointed to no great change in circumstances that would create a constitutional requirement for a second competency hearing, this ground is without merit and should be denied.

D. Confession

In his fourth ground for relief, Petition claims that his Fifth and Fourteenth Amendment rights were violated because his *Miranda* rights were violated when the police did not scrupulously honor his desire to remain silent when he was questioned by the police after he was arrested. Petitioner therefore asserts that he is entitled to a reversal of both is conviction and his death sentence. In response, Respondent asserts that this ground is procedurally barred because Petitioner failed to exhaust his state court remedies.

Petitioner did not raise this claim either on direct appeal or during the state habeas process. Procedural default occurs when a petitioner fails to exhaust all available state remedies *and* the state court to which he would be required to petition would now find that the claim is procedurally defaulted. *Beldsoe v. Johnson,* 188 F.3d 250, 254 (5th Cir. 1999). And indeed, were this unexhausted claim now brought in a subsequent state writ of habeas corpus, the Court of Criminal Appeals would consider this claim to be procedurally defaulted under Article 11.071 § 5 of the Texas Code of Criminal Procedure, which prohibits a claim from being raised in a subsequent habeas application unless: 1) it could not have been raised in the previous application because the federal or legal basis was unavailable at the time; or 2) the claim contains sufficient facts establishing that, but for a violation of the United States Constitution, no rational juror would have found petitioner guilty or would have answered the punishment issues in the State's favor. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.071 § 5(a) (Vernon Supp. 1999). Clearly, the legal claim presented in t his ground for relief was available to

him at the time he filed his state habeas application. Moreover, Petitioner has not proven that this unexhausted claim contains sufficient facts establishing that, but for a federal constitutional violation, *no* rational juror would have found him guilty or sentenced him to death.[3] Accordingly, Petitioner is procedurally barred from raising this ground for relief in a federal petition for writ of habeas corpus unless he can establish either cause and prejudice for the failure to raise this unexhausted claim at the state level or that the failure to consider the claim on its merits would result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.), *cert. denied*, 120 S.Ct. 444 (1999). This he has not attempted to do. Accordingly, this ground is procedurally barred, and it is recommended that it be

---

[3] In that regard, while Petitioner does contend that the alleged error is not harmless error, any harmless error analysis conducted by a federal habeas court would be under the standard outlined in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), under which trial error is considered harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict. Under 11.071 § 5 of the Texas Code of Criminal Procedure, however, in order to be able to raise a claim in a subsequent state habeas petition where the underlying facts were known at the time of the first petition, one must meet the more rigorous legal sufficiency standard. While it is questionable whether Petitioner could meet even the habeas harmless error standard, he has certainly not shown that he can meet the second, given that, even without considering his confession to the crime, he was found camped out very near the house where the women were attacked, he was wearing clothes from the house when he was arrested and was in possession of other items from the house, and his fingerprints were found on the window into the closet that was shown to be the point of entry for the attacker.

denied.[4]

E. Ineffective Assistance of Counsel at Trial

In his fifth ground for relief, Petitioner asserts that his trial counsel were ineffective in several ways. Specifically, Petitioner contends that his trial counsel were ineffective for: 1) failing to object to the instructions

---

[4] Respondent also asserts that this ground is also without merit. Thee has been, however inadequate factual development of this claim to make a determination on the merits. Namely, the state court records do not contain the record of the pre-trial hearing regarding the voluntariness of petitioner's written statement. This record was apparently never requested by either appellate or state habeas counsel, perhaps because no claim was ever raised at the state level that was based on the evidence gathered at this hearing. Therefore, Petitioner bases his claim here on one statement made at the trial by the police officer who took the statement that Petitioner was asked if he wanted to talk about the offense and he said "no." However, even though this statement was made during cross-examination, no context was given for this statement and defense trial counsel never questioned th is police officer any further about any possible indication from Petitioner that he did not want to speak to the officer. (R. IX:84-99) Indeed, trial counsel only objected to the admission of the statement at trial on the basis that Petitioner was insane at the time he gave the statement and therefore was not capable of giving a voluntary statement, the same objection made at the pre-trial hearing and in a pre-trial suppression motion. (R. IX: 79-80; TR.:47). The record does reflect, however, that the trial judge issued findings after the suppression hearing in which he stated that he had listened to testimony from both lay and expert witnesses at the hearing and had determined that the statement was freely and voluntarily made without coercion, mistreatment, promises, or threats. (Tr.: 96-97). Thus, other than the one statement that Petitioner points to, there is no further evidence that the State did not honor a request from Petitioner to remain silent. But, in any regard, without the record from this hearing or any further factual development of this claim this Court declines to review it on its merits.

given to the jury at the competency hearing; 2) failing to conduct an adequate investigation into potentially mitigating evidence; 3) failing to present additional expert 5testimony regarding Petitioner's mental illness; and 4) failing to object to Dr. James Grigson's testimony regarding Petitioner's future dangerousness.

Standard of Review

Whether counsel has been ineffective is determined by using the standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, in order to prove that his counsel was ineffective, a defendant must prove by a preponderance of the evidence both that counsel's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. Courts, however, should "indulge a strong presumption: that counsel's conduct falls within the range of reasonable assistance, and a defendant must overcome the presumption that an action is sound trial strategy. *Id.* At 689.

Analysis

1. Jury Charge

Petitioner first asserts that his trial counsel was ineffective for failing to object to the jury charge at the competency hearing because it stated that Petitioner was presumed competent and placed the burden on Petitioner to prove that he was incompetent by a preponderance of the evidence. Citing *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987), Petitioner contends that under Texas law the State should have had the burden of proving beyond a reasonable doubt that Petitioner was

competent to stand trial because there had been a prior finding of competency. Accordingly, Petitioner argues that his trial counsel was ineffective in allowing the burden to remain on the Petitioner.

In *Manning*, the Court of Criminal Appeals recited the relevant law regarding the burden of proof of competency hearings. Namely, a criminal defendant has the burden of proving by preponderance of the evidence his incompetency to stand trial, except that this burden shifts to the State if there has been a prior, unvacated adjudication of incompetency. *Id.* At 748. Petitioner points to the fact that Dr. Schack had previously given his expert opinion that Petitioner was incompetent to stand trial for earlier robbery charges, after which the charges were dismissed and Petitioner was civilly committed to Terrell State Hospital, where he remained for five days. (Tr.:17-19; R.IX:155-56, 197-200). Petitioner then contends that this was a prior adjudication of incompetency. Petitioner's argument, however, ignores state law. Specifically, under Texas state law the fact that a person has been ordered by a court to submit to mental health services is not an adjudication of mental incompetency. Rather, a judicial finding of incompetence is required to rebut the initial presumption that a person is mentally competent. TEX. HEALTH & SAFETY CODE ANN. § 576.002 (Vernon 1991). Accordingly, trial counsel was not ineffective for failing to object to the jury charge at the competency hearing because the jury charge correctly placed the burden of proving incompetence on Petitioner. The state habeas court denied this claim, and that decision is not contrary to federal law.

2. Mitigating Evidence

Petitioner next contends that his trial attorney was ineffective for failing to investigate and present sufficient mitigating evidence at the punishment phase of the trial. Specifically, Petitioner asserts that he has two sisters who were available to testify regarding child abuse and poverty. Respondent asserts in reply that this claim is unexhausted and procedurally barred.

This claim was not raised at the state level, either on direct or collateral appeal. Indeed, no information about Petitioner's childhood was presented to the state courts. This claim is therefore unexhausted. Petitioner has not alleged, much less proven, that the factual or legal basis for this claim was not available when the state habeas application was filed or that, but for this alleged ineffectiveness no rational juror would have answered the punishment issues in the State's favor. *See* TEX. CODE CRIM. PROC. ANN. 11.071 § 5(a) (Vernon Supp. 1999). Nor has he alleged or proven cause and prejudice for not presenting this claim at the state level or that a fundamental miscarriage of justice would occur if this claim was not considered by this Court. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This claim, therefore, is procedurally barred.

Furthermore, even if it were considered on its merits, it would fail. While Petitioner has stated in his petition that Petitioner has two sisters who were willing and available to testify, and states withing the petition what information these women would have been willing to testify to, no sworn affidavits from these women have been presented to either this Court or the state courts.

And, other than stating that they were available to testify, Petitioner has not shown that his trial counsel either knew or should have known about these women. In that regard, the record from the trial indicates that Petitioner never provided any biographical information to anyone. Indeed, when he was arrested he refused to give his name to the police and the police had to identify him by his fingerprints. (R.IX:74-75).[5] Dr. Schack testified that Petitioner was extremely uncooperative with him and gave him only minimal information about himself, and Dr. Nguyen testified that Petitioner would not discuss his personal life with him. (R.II:18-19, 82; R. IX:167). Only the jailer who testified at the competency hearing testified regarding any of Petitioner's personal history, and he testified only that Petitioner told him he was from Detroit, but otherwise did not speak of his past. (R. II:49). While Petitioner states generally that his sisters were "willing and available to testify," he does not elaborate what "available to testify" means. Without any evidence that trial counsel knew about these witnesses or would have been able to located these witnesses, considering the fact that he had an extremely uncooperative client, counsel cannot be considered ineffective for failing to present this evidence. *Wiley v. Puckett*, 969 F.2d 86, 99 (5th Cir. 1992) (recognizing that an attorney's investigation into mitigating evidence may reasonably me limited where a defendant fails to call witnesses to his attention); *Johnson v. Collins*, 964 F.2d 1527, 1533 (5th Cir. 1992) (holding that counsel was not constitutionally ineffective where he made a good faith effort to locate mitigation witness especially because his investigation was frustrated by an uncooperative client).

---

[5] Petitioner had prior convictions in Virginia and North Carolina back in the 1960's and 1970's. (State's ex. #38,39).

Petitioner has therefore failed to present sufficient evidence to support this claim of ineffectiveness.

3. Mental Health evidence

Petitioner also asserts that his trial counsel was ineffective for not presenting additional evidence of his bipolar disorder as further mitigating evidence at punishment. Petitioner argues that trial counsel provided constitutionally deficient representation by only calling Dr. Schack to testify about Petitioner's bipolar disorder and not calling additional expert witnesses as further support for this diagnosis.

Petitioner contends that, because Dr. Schack had previously testified at the guilt phase and had given his opinion that Petitioner was insane at the time of the murder, something that was rejected by the jury, the jury would have been prejudiced against Schack's testimony at the punishment phase of the trial. Petitioner further argues that Petitioner did not present *enough* evidence about his mental illness so that the jury did not have a complete and accurate picture of Petitioner's illness. For instance, Petitioner has submitted as evidence two letters from psychiatrists Dr. Crowder and Dr. Patel. In his letter, Dr. Crowder, while supporting Dr. Schack's diagnosis opines that Dr. Schack did not sufficiently emphasize in his testimony the point that people with the bipolar disorder have a significant tendency to commit criminal acts as a result of their impulsivity and poor judgment. (Petition, ex. S). In his letter, Dr. Patel also states his support for the bipolar diagnosis and further states that people with this disorder who remain untreated have a high degree of violence. (Petition, ex. T).

The Fifth Circuit has states that a failure to present mitigating evidence at the punishment phase of a trial is not ineffective assistance *per se*. *Smith v. Cockrell*, 311 F.3d 661, 669 (5th Cir. 2002). Instead, each case must be determined on its facts, and a reviewing court should be wary of an argument that an attorney did not investigate enough or failed to present enough evidence. *Id., citing Dowthitt v. Johnson*,230 F.3d 733, 743 (5th Cir. 2000).

At the guilt phase of the trial, Dr. Schack testified that Petitioner has bipolar disorder, a disorder characterized by irrational thoughts and impulsive behavior. Schack further testified that someone with bipolar disorder can become violent and dangerous. (R.IX:161). In specific, Schack testified that Petitioner show symptoms such as argumentativeness, irritability and impaired judgment. Schack also testified that Petitioner had delusions of grandeur and paranoid delusions and that his condition rendered him unable to understand that his contact on the day of the murder was wrong. (R.IX:166, 188, 192). At the punishment phase of the trial, Schack testified that treatment through the use of medication would reduce the odds of future acts of violence. (R.IX:286-87). Thus, Schack did testify about Petitioner's poor impulse control and poor judgment, the tendency towards violence, and the availability of treatment. Therefore, Petitioner's argument is not that trial counsel did not present this type of evidence, but rather that trial counsel did not present enough evidence about his mental health. Trial counsel, however, presented the testimony of a psychiatrist who had examined Petitioner both before and after the murder, had diagnosed him as having bipolar disorder before he committed capital murder, and whose professional opinion had remained constant

throughout the months that Petitioner was incarcerated. With the exception of Dr. Nguyen, who testified for the State at the guilt phase of the trial, no other mental health expert had examined Petitioner in such close proximity to the murder. And, Dr. Schack had also been appointed by the trial counsel to examine Petitioner after the murder. Thus, he had had the most contact with Petitioner over the longest period of time. While undoubtably trial counsel *could* have attempted to have Petitioner examined by a second expert, it was not deficient performance not to do so.

Moreover, given that all of the evidence about bipolar disorder that Drs. Crowder and Patel mention in their letters was testified to by Dr. Schack, Petitioner has not shown a reasonable probability that he would not have received a death sentence had another witness testified.[6] This ground was denied at the state habeas level, and this decision is not contrary to federal law.

4. Dr. Grigson's testimony

Finally, Petitioner asserts that his trial counsel was ineffective for failing to object to Grigson's testimony at

---

[6] While Petitioner argues, without supporting evidence, that the jury was prejudiced against Schack because it had not found that Petitioner was insane at the time of the murder, it should be noted that the burden of proof was on the defense to prove insanity at the guilt phase. (Tr.:110). Given that Petitioner gave a written statement shortly after the murder stating in extreme detail all of the circumstances surrounding the murder, and that the officer who took this statement testified at trial that Petitioner told him that he knew what he did was wrong and he regretted it, but that there was nothing else he could have done, that burden was a difficult one to meet. (R.IX:80-83, 99-100). The defense did not have such a burden of proof at the punishment phase of the trial, however.

the punishment phase of the trial. Petitioner contends that defense counsel should have objected to Grigson's testimony because Grigson has a "notorious" reputation and because the American Psychiatric Association had condemned the practice of psychiatrists predicting future dangerousness.

As noted by Respondent, Petitioner's argument is flawed because the Texas Court of Criminal Appeals, the Fifth Circuit, and the Supreme Court have all held that the federal constitution does not prohibit a psychiatrist, by way of answering a hypothetical question, giving an opinion on the future dangerousness of a hypothetical defendant. *Barefoot v. Estelle*, 463 U.S. 880, 898-899 (1983); *Little v. Johnson*, 162 F.3d 855, 862-63 (5th Cir. 1998); *Matson v. State*, 819 S.W.2d 839, 852 (Tex. Crim. App. 1991). This is precisely what occurred in the case at hand. (R.IX:280-82). Furthermore, on cross-examination trial counsel was successful in getting Grigson to concede that if a criminal defendant had bipolar disorder, treatment with medication would affect his opinion that that person would be a future danger to society. (R.IX:283-84). Therefore, not only was Grigson's testimony not objectionable, and trial counsel not ineffective for failing to make a futile objection, but trial counsel appropriately addressed Grigson's testimony through cross-examination. This ground was denied by the state habeas court, and that decision is not contrary to federal law. It is recommended that Petitioner's fifth ground for relief be denied.

F. Ineffective Assistance of Counsel on Appeal

In his sixth ground for relief, Petitioner contends that he received ineffective assistance of counsel on

appeal. Petitioner argues that his appellate counsel was ineffective for failing to have the transcript prepared from the pre-trial suppression hearing and for failing to raise as a point of error on appeal the claim that the burden of proof at the competency hearing was improperly allocated to Petitioner.

Standard of Review

The federal constitution guarantees a criminal defendant the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387,396 (1985). As with trial counsel, whether appellate counsel has been ineffective is determined by using the standard enunciated in *Strickland v. Washington*, under which a defendant must prove by a preponderance of the evidence both that counsel's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. In the context of appeals, the Constitution does not require an appellate attorney to advance every conceivable argument, and it can be effective assistance of counsel on appeal to focus on a few key issues. *Evitts v. Lucey*, 469 U.S. at 394; *Mayo v. Lynaugh*, 882 F.2d 134, 139 (5th Cir. 1989), *modified on other grounds*, 920 F.2d 251 (5th Cir. 1990).

Analysis

Petitioner first asserts that his appellate counsel was ineffective for failing to request a transcript of the pre-trial suppression hearing, which could then have been used both as support for his claim at trial that he did not knowingly and voluntarily make a written

statement about the murder and his current claim that the police did not honor the fact that he exercised his right to remain silent when his statement was taken.

This ground was not raised at the state level. Petitioner has not alleged, much less established that he meets the procedural requirements in order for this Court to consider an unexhausted claim on its merits. Accordingly, the claim is procedurally barred.

Moreover, even if it is considered on its merits, as permitted under § 2254(b)(2), it fails. Namely, Petitioner has failed to establish any prejudice. Under *Strickland*, Petitioner must show a reasonable probability that, but for his counsel's deficient representation, he would have prevailed on his appeal. *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001). With regard to his current claim that his right to remain silent was not "scrupulously honored," there was no objection made on this basis at trial. Thus, even had appellate counsel had a transcript of the pre-trial hearing *and* raised this issue on appeal, Petitioner has not shown that the Court of Criminal Appeals would have granted relief on a claim where error was not preserved at the trial level. Furthermore, this Court is not in possession of the record from the pre-trial suppression hearing, and it was not obtained during the state habeas process, either. Petitioner has therefore failed to adequately develop the factual basis of this claim. Without this record, this Court is left with the trial court's findings that Petitioner's statement was a knowing and voluntary one. There is therefore no factual support for Petitioner's claim that, had this record been obtained, there is a reasonable probability that he would have prevailed on appeal. This claim is without merit.

Petitioner also asserts that his appellate counsel was ineffective for failing to raise as an issue the allegedly incorrect burden of proof at the competency hearing. This Court has already determined that the burden of proof at the competency was correct under Texas state law. *See Manning v. State*, 730 S.W.2d 744, 748 n. 3. (Tex. Crim. App. 1987). Appellate counsel was not ineffective for failing to assert a meritless claim. This claim was denied at the state habeas level, and this decision was not contrary to federal law. It is recommended that Petitioner's sixth ground for relief be denied.

G. Testimony of Dr. James Grigson

In his seventh ground for relief, Petitioner argues that his rights under the Fifth and Fourteenth Amendments were violated because Dr. James Grigson testified at the guilt phase of the trial, giving his opinion that Petitioner was sane when he committed the murder, and testified at the punishment phase of the trial, giving his opinion that Petitioner is a future danger to society. Specifically, Petitioner asserts that his testimony violated his rights under *Miranda* because Petitioner's post-arrest silence was used against him at trial.

In *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the Supreme Court held that it was a violation of due process to use a criminal defendant's post-*Miranda* warnings silence as evidence of his sanity. In *Greenfield*, the defendant had entered an insanity plea, and the State had the burden under state law to prove that he was sane when he committed the sexual assault. The prosecutor used evidence of the defendant's refusal, shortly after the assault, to answer questions from police

officers before speaking to his attorney to help prove that the defendant was sane when he committed the offense. The Supreme Court held that this violated Greenfield's due process rights because *Miranda* rights carry with them an implicit promise that the exercise of those rights will not be penalized. *Id.* at 291-92. *Greenfield* was an extension of the rule announced in *Doyle v. Ohio*, 426 U.S. 610 (1976), in which the Supreme Court held that it violates a criminal defendant's due process rights to have his post-*Miranda*-warning silence to impeach him at trial.

The Fifth Circuit has stated that a witness' remarks constitute a comment on a defendant's silence if the actual intent was to comment on the sile4nce or if the character of the remark was such that the jury would so construe the remark. *United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir. 1992). The Supreme Court has also held that *Doyle* error raised at the federal habeas level is subject to the harmless error standard of whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Prior to Petitioner's trial, the trial court appointed psychiatrists James Grigson and Richard Schack to evaluate Petitioner in order to determine both his competence to stand trial and his sanity at the time of the murder. (Tr.:53-4).; The State called Grigson as a witness at trial. During the guilt portion of the trial, Grigson testified that he attempted to interview Petitioner pursuant to the court order. Grigson further testified that he was not able to examine Petitioner because Petitioner declined to speak to Grigson after Grigson read him his *Miranda* warnings. (R.IX:206).

Grigson further testified that Petitioner appeared to understand his rights and chose to take advantage of the right to refuse to speak to Grigson. (R.IX:206-7). Grigson later testified that, based on observing him for no more than five minutes in this initial meeting, observing him at the competency hearing, and reviewing Petitioner's records from Terrell State hospital, he did not believe that Petitioner suffered from any mental disease or defect that prevented him from knowing right from wrong. (R.IX:208).[7] Grigson also testified that when he observed Petitioner in his jail cell the first time his behavior was normal. (R.IX:208-9). Finally, at the punishment phase of the trial Grigson answered a hypothetical question posed by the prosecutor, based on facts from the trial. (R.IX:281-82).

Petitioner contends that Grigson's testimony regarding their initial meeting, as well as his testimony about Petitioner's demeanor at the subsequent competency hearing, violated the rule set forth in *Greenfield* because his post-*Miranda* warnings silence was used as evidence to prove both his sanity and his future dangerousness. Respondent asserts that Petitioner's constitutional rights were not violated because Grigson testified about his demeanor at the initial meeting, not his silence after receiving his *Miranda* warnings. Respondent further asserts that Grigson's testimony regarding Petitioner demeanor at the competency hearing does not violate *Greenfield*

---

[7] During his testimony at trial, Grigson did not mention that the second time that he observed Petitioner was during the competency trial. Instead, Grigson stated generally that he was able to observe Petitioner for about an hour and a half in March of 1989, but never spoke to him at this point, either. (R.IX:207).

because his "silence" at the hearing was not induced by the reading of *Miranda* rights to him several months earlier.

This claim was denied at the state habeas level. The denial of this claim by the state court is not contrary to federal law. First, Grigson's testimony at the guilt phase of the trial regarding Petitioner's demeanor at the competency hearing cannot be considered testimony regarding post-*Miranda* warnings silence. Although Grigson did not testify specifically about whether he observed at the competency hearing, to the extent that he meant Petitioner's silence at this hearing, as opposed to the comments he made at the hearing, this silence that occurred several months later after the initial meeting in the context of a competency hearing was not induced by the *Miranda* warnings. Therefore, there was no *Greenfield* violation. Second, with regard to Grigson's testimony at the punishment phase of the trial, his testimony was based on a hypothetical question, not on either Petitioner's silence at their initial meeting or his silence during his competency hearing. Thus, this was also not a violation of *Greenfield.*

Finally, however, Grigson's testimony at the guilt phase of the trial regarding his initial meeting with Petitioner is a closer call. While Grigson testified about Petitioner's demeanor during this five minutes, he also testified that Petitioner was given his *Miranda* rights and specifically declined to speak to Grigson. Grigson then used his "demeanor" at this initial meeting, along with other evidence, to give his opinion that Petitioner was not insane when he committed the murder. But, even if this was a violation of the rule set forth in *Greenfield*, it was harmless error. In *Brecht v.*

Abrahamson, 507 U.S. 619, 623 (1993), the Supreme Court held that the standard for determining whether federal habeas relief must be granted in a case where there has been *Doyle* error is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. In *Brecht*, the Supreme Court held that the petitioner was not entitled to relief even though the State had referred to his post-*Miranda* warnings silence to impeach him because these references were only two pages of a 900-page trial transcript and because the State also made many permissible references to the petitioner's pre-*Miranda* silence to further impeach his exculpatory story. *Id.* 639.

Applying this standard to the case at hand, it cannot be said that Grigson's brief reference to Petitioner declining to speak to him at their first meeting had a substantial and injurious effect on the jury's verdict. The prosecutor never referred to this testimony in her closing statement. And, to support its position that Petitioner was sane when he committed the murder, the State also presented the testimony of Dr. Nguyen from Terrell State Hospital, who observed Petitioner for five days shortly before the murder and gave his opinion that Petitioner did not suffer from a mental disease or defect that prevented him from knowing right from wrong. (R.IX:238-39). Moreover, the brief statement about his initial meeting with Petitioner, which occurred months after the murder, was a small portion of Grigson's testimony and comprised only part of the basis for his opinion that Petitioner was sane when he committed the offense. Because the reference to Petitioner availing himself of the right to decline any interview with Dr.

Grigson was isolated and was never emphasized by the State, any error committed was harmless. It is therefore recommended that this ground for relief be denied.

H. Punishment Special Issues

In his eighth ground for relief, Petitioner asserts that the jury that decided his sentence was unable to either consider or give effect to his mitigating evidence of a mental illness through the special issues the jury was required to answer at the punishment phase of the trial. Petitioner further asserts that based upon the Supreme Court's opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and its subsequent decisions further clarifying *Penry*, his death sentence should be set aside.

Because Petitioner committed capital murder prior to September of 1991, his jury was required to answer issues regarding whether the murder was committed deliberately, whether there was a probability that Petitioner would be a future danger to society, and whether the killing was unreasonable in response to any provocation from the victim. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07(b) (Vernon 1981).[8] Petitioner cites *Penry*

---

[8] The three questions that the jury was required to answer at Petitioner's trial were:

> Was the conduct of the defendant, Charles E. Mines, Jr. AKA Charles Anderson, that caused the death of the deceased, Vivian Moreno, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there probability that the defendant, Charles E. Mines, Jr. AKA Charles Anderson, would

v. Lynaugh, a Texas capital murder case, as support for his claim that the jury in his case was unable to consider the mitigating evidence he presented in answering these questions. The punishment special issues given to the jury at Penry's trial were the same as those given to the jury at Petitioner's trial. In *Penry*, the Supreme Court held that Penry's constitutional rights were violated because the jury in Penry's capital murder trial was unable to give any mitigating effect, through the punishment special issues as they existed at that time, to evidence presented by the defense that Penry was mentally retarded and suffered severe physical and emotional abuse as a child. The Supreme Court ruled that the jury was unable to give any mitigating effect to this evidence because a juror could have believed that Penry committed the murder deliberately and that he would be a future danger to society and also believed that he should not be executed because of his retardation and the abuse he suffered, but would have been unable to vote to spare his life. Indeed, the Supreme Court noted that Penry's evidence of mental retardation and severe childhood abuse was a "double-edged sword" because it mitigated his responsibility because he would be less able to control his behavior than an average person, but, because he could not learn from his mistakes due to his mental limitations, he posed a future danger

---

> commit criminal acts of violence that would constitute a continuing threat to society?
>
> Was the conduct of the defendant Charles E. Mines, Jr. AKA Charles Anderson, in killing Vivian Moreno, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Tr. 114-15).

to society. 492 U.S. at 322-5.[9] Although at the time of Petitioner's trial the trial court was not statutorily required to submit a mitigation special instruction, Petitioner contends that such an instruction was constitutionally required because the jurors in his case, like the jurors in Penry's case, were unable to adequately consider the mitigating evidence that he presented at trial through their answers to the two special issues.

Subsequent to *Penry*, the Supreme Court has stated that a trial court's refusal to give an additional mitigating instruction does not constitute a constitutional error unless there is a reasonable probability that the jury applied the challenged instructions in a way that prevented the consideration of constitutionally relevant mitigating evidence. *Boyde v. California* , 494 U.S. 370, 382 (1990); *Johnson v. Texas*, 509 U.S. 350, 367-8 (1993). Moreover, the Supreme Court has specifically stated that a state may shape and structure the jury's consideration of evidence at the

---

[9] After Penry was handed down by the Supreme Court, and after Mines' trial, Article 37.071 of the Texas Code of Criminal Procedure was amended, the deliberateness special issue was deleted, and a mitigation special issue was added. The mitigation special issue that has been added to Article 37.071 reads as follows:

> Whether taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. ANN. art. 37.07(e) (Vernon Supp. 1999)

punishment phase of a capital murder trial, so long as it does not preclude the jury from giving effect to any relevant evidence. *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998).

In *Maldon v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994), the Fifth Circuit outlined the analysis that should be done for evaluating *Penry* claims such as the one Petitioner makes. First, for a petitioner to be entitled to relief on a claim that the jury was unable to consider mitigating evidence, the mitigating evidence must be constitutionally relevant and second, it must have been beyond the effective reach of the jurors. Mitigating evidence is constitutionally relevant in a *Penry* claim where a defendant has shown that he has a uniquely severe permanent handicap through no fault of his own and that the criminal act was attributable to this severe permanent condition. *Boyd v. Johnson*, 167, F.3d 907, 911-2 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999). Recently, in *Robertson v. Cockrell*, 2003 WL 1204119 (5th Cir. March 21, 2003), the Fifth Circuit recognized that it views *Penry* claims in order to determine whether the evidence in question constitutes an involuntary disability, which is both permanent and severe, and from which the criminal acts were a consequence. Only if all four factors are present has the Fifth Circuit held that an additional mitigating evidence special issue required in order to allow the jury to give full effect to the proffered mitigating evidence. *Robertson*, slip op. at 6-7. Thus, for Petitioner to be entitled to relief on this claim, he must establish both that there was evidence presented at his trial that he was a uniquely severe permanent handicap and that the murder was

attributable to this condition as well as that the jury was unable to consider this evidence through two special issues given to them.

At the guilt phase of the trial, Petitioner presented evidence through the testimony of Dr. Schack that he suffers from bipolar disorder, a mental illness that is characterized by irrational thinking, impulsive behavior, grandiose thinking, impaired judgment, possible violent and dangerous behavior, paranoia, and poor judgment. (R. IX: 16y2-66). Dr. Schack then gave his opinion that, because of his mental illness, Petitioner was not capable of knowing right from wrong on the day of the murder. (R. IX:169). At the punishment phase of the trial, however, Schack further testified that bipolar disorder is a treatable disease through the use of hospitalization and medications. He also testified that, without treatment, Petitioner had a high probability of committing future acts of violence, but that through treatment the odds of him committing future acts of violence would be reduced. (R. IX:284-88). In his closing statement at the punishment phase of the trial, Petitioner's attorney argued that Petitioner could not have deliberately killed the victim because of his mental illness and that he would not be a future danger because his illness was treatable. (R. IX:303-310).

The Fifth Circuit has previously held that evidence of a mental illness, such as schizophrenia, that can be controlled by treatment is mitigating evidence that can be considered by a jury within the context of the future dangerousness special issue. *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir. 1998); *Robison v. Johnson*, 151 F.3d 256, 269 (5th Cir. 1998) (on rehearing). At his trial, Petitioner not only presented evidence that his mental

illness is treatable and when treated would lower any future potential for violence, but defense counsel specifically argued that this evidence established that Petitioner would not constitute a future danger to society. On direct appeal and again on remand from the Supreme Court the Court of Criminal Appeals ruled that Petitioner's mitigating evidence of a mental illness could be adequately considered through the first two special issues that the jury was required to answer. *Mines v. State*, 888 S.W.2d 817-18 (Tex. Crim. App. 1994) *cert. denied*, 514 U.S.1117 (1994); *Mines v. State*, 852 S.W.2d 941, 951 (Tex. Crim. App. 1992). These decisions are not an unreasonable application of federal law. It is recommended that Petitioner's eighth ground for relief b e denied.

I. Jury Composition

In his ninth ground for relief, Petitioner argues that his constitutional rights under the Sixth and Fourteenth Amendments were violated because his jury was chosen from a venire in which African-Americans were statistically underrepresented. Specifically, Petitioner asserts that, because there were only three African-Americans, in the eighty people in the venire from which his jury was chosen, 3.75% of the venire, and census date from 1990 show that ten percent of the population of Ellis County was African-American at that time, African-Americans were unconstitutionally underrepresented in his venire. Accordingly, Petitioner argues that his Sixth Amendment right to a jury drawn from a fair cross-section of community and his Fourteenth Amendment equal protection rights were violated.

The Supreme Court has held that the Sixth Amendment right to a jury trial requires that the jury be selected from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528-29 (1975). Therefore jury venires must not systemically exclude distinctive groups in the community. *Duren v. Missouri*, 439 U.S. 357- 363-64 (1979). In order to establish a *prima facie* Sixth Amendment fair cross-section violation, one must show that: 1) the group was alleged to have been excluded is a distinctive group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of this group in the community; and 3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Id.* At 364. However, the Supreme Court has noted that the Sixth Amendment does not require petit juries, as opposed to panels or venires, to reflect the composition of the community at large. *Lockhart v. McCree,*476 U.. 162, 173 (1986).

The Supreme Court has also held that the Equal Protection clause of the Fourteenth Amendment prohibits a criminal defendant from being tried by a petit jury from which all members of his race, solely because of their race, have been excluded. *Hernandez v. Texas*, 347 U.S. 475, 477 (1954). Likewise, it is a violation of the equal protection clause for a group to be substantially underrepresented as jurors, if this underrepresentation results from purposeful discrimination. *Castaneda v. Partida*, 430 U.S. 482, 493 (1977). In order to establish such an equal protection violation, a defendant must show that the procedure employed resulted in the substantial underrepresentation of his race. *Id.* At 494. A *prima*

facie violation is established when it is shown that a recognizable, distinct group has been underrepresented. This "rule of exclusion" is shown by comparing the proportion of the group in the general population with the proportion called for jury service over an extended period of time. *Castaneda v. Partida*, 430 U.S. at 494-95; *Hernandez*, 347 U.S. at 480-81. Finally, a selection procedure that is susceptible of abuse or is not racially neutral supports a presumption of discrimination raised by a statistical showing of underrepresentation. *Partida*, 430 U.S. at 494.

Petitioner has failed to establish either a *prima facie* Sixth Amendment violation or a Fourteenth Amendment violation. While the Fifth Circuit has recognized that African-Americans are a distinctive group in the community, *McGinnis v. Johnson,* 181 F.3d 686, 690 (5th Cir. 1999), Petitioner has failed to meet the other requirements of a *prima facie* violation of either the Sixth or Fourteenth Amendment. In particular, Petitioner has, both at the state habeas level and here, presented evidence of the number of African-Americans in the venire from which his jury was chosen relative to the number of African-Americans in the community. He has not, however, presented any evidence that African-Americans had been underrepresented over a period of time within the group of people called for jury service. One case of alleged underrepresentation is not sufficient evidence to establish, under the *prima facie* tests, general underrepresentation of a distinctive group from jury venires. *Timmel v. Phillips,* 799 F.2d 1083, 1086 (5th Cir. 1986). Moreover, Petitioner has failed to establish either any systematic exclusion of African-Americans from jury venires in Ellis County or that the procedure used to select people for jury service was

susceptible to abuse and/or not race neutral. *See Alexander v. Louisiana,* 405 U.S. 625, 630 (1972) (holding that Alexander had made a *prima facie* case of discrimination under the Fourteenth Amendment in the method used for choosing the grand jury that indicted Alexander where there was statistical evidence of the systematic exclusion of African-Americans from grand jury panel *and* the selection procedure itself was not racially neutral). At the time of Petitioner's trial, jurors were chosen fro the current voter registration list from a particular county, updated annually. *See* TEX. GOV'T CODE ANN. § 62.001 (Vernon Supp. 1988). Petitioner has not shown that a jury venire taken from the current voter registration list of Ellis County is either a systematic exclusion of African-Americans or is a system susceptible of abuse, let alone that it is somehow not a race neutral manner of calling citizens for jury service.

This ground for relief was denied at the state habeas level. That decision is not contrary to clearly established federal law. It is therefore recommended that this ground be denied.

J. Texas' Capital Sentencing Statute

In his tenth ground for relief, Petitioner asserts that Texas' capital sentencing statute violates the Fifth, Eighth, and Fourteenth Amendments because the sentencing jury is allowed unbridled discretion in assessing punishment without the proper consideration of mitigating evidence necessary to fulfill the constitutional requirement of individualized sentencing. Petitioner further contends that the Court of Criminal Appeals has failed to adhere to any guidelines in weighing punishment evidence on direct appeal. As

support for this argument, Petitioner cites Justice Blackmun's dissent in *Callins v. Collins,* 510 U.S. 1141 (1994), and argues that this Court should vacate his death sentence and hold that the Constitution "prohibits the imposition of the death penalty until either the Texas Legislature or the Court of Criminal Appeals designs a scheme capable of eliminating the sentencer's unbridled discretion to inflict death while simultaneously permitting unrestricted consideration of mitigating evidence." (Petition at 90).

Contrary to Petitioner's argument, in *Jurek v. Texas,* 428 U.S. 262 (1976), the Supreme Court upheld the version of the Texas death penalty statute under which Petitioner was tried. Thus, the Supreme Court has specifically ruled that the manner in which Texas narrows the class of murderers eligible for the death penalty passes constitutional muster by eliminating arbitrariness in the determination of who is eligible to receive the death penalty.

With regard to Petitioner's allegation that the Texas death penalty scheme fails to allow adequate discretion in considering mitigating evidence, the Supreme Court noted in *Tuilaepa v. California,* 512 U.S. 967, 974 (1994) that, "[i]n providing for individualized sentencing, it must be recognized that the States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion." Moreover, citing *Zant v. Stephens,* 462 U.S. 862, 875 (1983), the Court in *Tuilaepa* specifically stated that a sentencer may be given unbridled discretion in determining whether to impose the death penalty once it is determined that the defendant is a member of the class that is eligible to receive the death penalty. *Tuilaepa,* 512 U.S. at 979-

980. These cases illustrate the requirement that, so long as the class of murder defendants is sufficiently tailored to avoid arbitrariness and a state provides a vehicle that is sufficient for the jury to consider all relevant punishment evidence, both aggravating and mitigating, a state capital sentencing statute will be considered constitutional.

With respect to the special issues given to the jury to answer in Petitioner's case, in *Jurek* the Supreme Court approved of the Texas future dangerousness issue and has continued to do so in subsequent cases. *See Pulley v. Harris,* 465 U.S. 37, 50-1 (1984). And, although in *Penry v. Texas,* 429 U.S. 302, 324-5 (1989), the Supreme Court held that certain mitigating evidence could not be adequately considered within the scope of the future dangerousness issue that the jury in Petitioner's trial received, as noted earlier, the Fifth Circuit has specifically held that mitigating evidence of the type that Petitioner introduced at trial can be fully considered with the special issues that the jury at his trial was required to answer. Thus, through various decisions, the Supreme Court has held that the Texas statute that establishes the subset of murderers eligible for the death penalty is constitutional and that the future dangerousness punishment special issue is a constitutionally adequate vehicle for juries to consider aggravating and most mitigating evidence. And, the Fifth Circuit has held that the type of mitigating evidence offered by Petitioner can be adequately considered within the context of the special issues answered by the jury at Petitioner's trial.

Finally, to the extent that Petitioner suggests that the constitution requires that the Court of Criminal Appeals weigh aggravating and mitigating evidence on appeal in order to determine whether a death sentence is warranted, the Supreme Court has held that the Constitution does not require any appellate proportionality review of a death sentence (either with other cases in which the defendants received the death penalty or with cases in which defendants did not receive the death penalty) where the statutory procedure adequately channels the sentencer's discretion. And, as noted earlier, the Supreme Court has specifically stated that Texas has a statutory scheme that adequately channels the sentencer's discretion. *See McCleskey v. Kemp,* 481 U.S. 279, 306-7 (1987); *Pulley v. Harris,* 465 U.S. at 50-1.

Moreover, in *Hughes v. Johnson,* 191 F.3d 607 (5th Cir. 1999), *cert. denied,* 528 U.S. 1145 (2000), the Fifth Circuit applied *Pulley v. Harris* in a case in which the petitioner argued that the Fourth and Eighth Amendments required that the mitigating evidence in his case be examined "independently" on appeal in order to determine whether or not the petitioner was death-worthy. The Fifth Circuit rejected this argument, stating that Hughes's argument was an argument, in essence, for a proportionality review of his case as compared to other death penalty cases, because implicit in his argument was that other death penalty defendants did not have the same amount or type of mitigating evidence as he did. The Fifth Circuit therefore held that, pursuant to *Pulley v. Harris*, an independent appellate review of mitigating evidence was not constitutionally required. *Hughes*, 191 F.3d at 621-3.

This grounds was denied at the state habeas level. This decision is not contrary to clearly established federal law. Accordingly, it is recommended that Petitioner's death penalty ground for relief be denied.

K. Cumulative Error

Finally, in his eleventh round for relief, Petitioner asserts that, even if he is not entitled to relief on any of his other claims individually, he is entitled to relief when his grounds for relief are considered cumulatively. Petitioner further contends that constitutional errors permeated his trial and appeal such that he was deprived of the "fundamental fairness guaranteed by the Fifth and Fourteenth Amendments."

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992), the Fifth Circuit held that in order for a federal habeas petitioner to prevail on a claim of cumulative error at a state trial, he must establish that: 1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; 2) errors were not procedurally defaulted for habeas purposes; and 3) the constitutional errors so infected entire trial that the resulting conviction violates due process. *Id.* At 1458.

Although Petitioner has alleged numerous constitutional violations, most of which have not been procedurally defaulted, aside from stating that these alleged violations deprived him of "fundamental fairness," Petitioner makes no argument that these alleged errors in their cumulative effect resulted in a verdict and/or sentence that violates due process. (Petition at 90-1). None of Petitioner's claims, either individually or aggregately, indicate that his trial was so

infected with constitutional errors that the resulting conviction is suspect or violates due process. Rather, Petitioner's conviction for capital murder was based on admissible and credible evidence, and he was represented by competent counsel at all stages of the trial. Petitioner's eleventh ground for relief is without merit, and he is not entitled to relief on this basis. Accordingly, it is recommended that is be denied.

RECOMMENDATION

Petitioner's first ground for relief should be DISMISSED without prejudice in order for Petitioner to exhaust his state court remedies. With regard to his remaining grounds for relief, Petitioner has failed to make a substantial showing of the denial of a federal right. The state court adjudication on the merits neither resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Petitioner's remaining ten grounds for relief should be DENIED.

Signed this 21st day of May, 2003.

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must serve and file written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S. Ct. 466, 472 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE